

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRACY NEIGHBORS AND BARBARA
NEIGHBORS; ARUL MENEZES AND
LUCRETIA VANDERWENDE; LAKE
SAMMAMISH 4257 LLC; HERBERT
MOORE AND ELYNNE MOORE; TED
DAVIS AND ELAINE DAVIS; REID
BROWN AND TERESA BROWN; SHAWN
HUARTE AND TRINA HUARTE;
ANNETTE MCNABB; EUGENE MOREL
AND ELIZABETH MOREL; VOLKER
ELSTE AND GAIL UREEL; JOHN R. WARD
AND JOANNA WARD, AS CO-TRUSTEES
OF THE WARD HALES LIVING TRUST;
YORK HUTTON; L. LARS KNUDSEN AND
LISE SHDO,

Plaintiffs,

v.

KING COUNTY, a municipal corporation and
political subdivision of the State of
Washington,

Defendant.

No. 2:15-cv-013580-MJP

**KING COUNTY'S MOTION TO
CONSOLIDATE**

NOTE ON MOTION CALENDAR:
OCTOBER 30, 2015

I. INTRODUCTION

Defendant King County hereby moves under Rule 42(a) to consolidate this action (“*Neighbors II*”) with companion litigation currently pending before Judge Pechman, *Hornish v. King County*, Case No. 2:15-cv-00284-MJP (“*Hornish*”). Both cases involve the same Plaintiffs’ counsel,

1 many of the same Plaintiffs, the same Defendant, and the same legal and factual issues stemming
 2 from railbanking of the East Lake Sammamish Rail Corridor (“ELSRC”). Given that consolidation
 3 and adjudication of these cases will conserve judicial resources without causing any delay or
 4 prejudice to the Plaintiffs, King County respectfully requests that the Court order consolidation of
 5 these matters.

6 **II. FACTS**

7 The same attorneys representing Plaintiffs in this litigation filed *Hornish* on February 25,
 8 2015. See Exhibit A to Declaration of Emily Harris (“Harris Decl.”). In *Hornish* – originally
 9 captioned *Sammamish Homeowners v. Cnty. of King* – Plaintiffs alleged that King County
 10 “improperly and illegally attempted to usurp the landowners’ fee interests in the subsurface rights
 11 and improperly is attempting to claim ownership in land that belongs to Plaintiffs, which King County
 12 has no right to do.” *Hornish*, Compl. ¶ 31 (Dkt. No. 1) (Feb. 25, 2015), Harris Decl. Ex. A.

13 King County then moved to dismiss *Hornish* on March 23, 2015, based on Plaintiffs’ failure
 14 to satisfy requirements to invoke the centerline presumption. *Hornish*, Mot. to Dismiss (Dkt. No. 9).
 15 The Court granted that motion, with leave to amend, holding that “[w]ith the centerline presumption
 16 rebutted, Plaintiffs have not properly alleged a property interest in the Corridor, and thus cannot plead
 17 an actual or even threatened ‘injury in fact’ sufficient to establish Article III standing.” *Hornish*,
 18 2015 WL 3561533, at *3 (W.D. Wash. June 5, 2015).

19 In response, Plaintiffs filed an amended complaint on August 14, 2015, seeking a declaratory
 20 judgment “that the original source conveyance to the railroad was an easement and other interests
 21 acquired by the railroad were prescriptive easements, that the easements were for railroad purposes
 22 only, and that Plaintiffs are the fee owners of the railroad right-of-way at issue, and King County only
 23 acquired a surface easement for a hiking and biking trail with the possible reactivation of a railroad
 24 pursuant to the Trails Act.” *Hornish*, Am. Compl. ¶ 39 (Dkt. No. 31). King County then filed an
 25 answer and counterclaims on August 28, 2015. *Hornish*, Answer (Dkt. No. 32). In its counterclaims,

King County alleged that it “owns fee title or exclusive railroad easement rights characterized as a ‘quasi-fee’ in the portions of the ELSRC that are adjacent to Plaintiffs’ property.” *Id.* at Counterclaim ¶ 2. Furthermore, King County asserted that Plaintiffs “have interfered with King County’s property rights in the ELSRC by erecting and maintaining various unauthorized improvements that impede King County’s access to its property, its exclusive control, and prevent public enjoyment.” *Id.* at Counterclaim ¶ 3. *Hornish*, including King County’s counterclaims, remains pending before the Court.¹

Subsequently, Plaintiffs’ counsel filed *Neighbors II* on August 20, 2015. Harris Decl. Ex. B. In this, their third and latest litigation, Plaintiffs allege that King County “did not acquire any interest in properties abutting the Plaintiffs’ properties when it accepted Defendant’s [*sic*] Quit Claim Deed.” *Neighbors II*, Compl. ¶ 21 (Dkt. No. 1) (Aug. 20, 2015). Likewise, Plaintiffs allege that even “[i]f Defendant is able to prove BNSF acquired prescriptive easement rights to widths greater than the railroad tracks, ties and ballast, Defendant later lost those rights when Plaintiffs improved and occupied major portions of the” ELSRC. *Id.* ¶ 23. According to Plaintiffs, their “uses and improvements include, without limitation construction of walkways, driveways, parking areas, landscaping systems, utilities and the planting of trees, shrubs and ground cover, all within the [ELSRC].” *Id.* ¶ 24.

In addition to being filed earlier, the *Hornish* litigation is more mature. Pursuant to a scheduling order from the Court, the parties have submitted a discovery plan preparing the case for trial by November 28, 2016. *Hornish*, Joint Status Report, ¶ 11 (Dkt. No. 38) (Sept. 30, 2015). The Parties have already begun to exchange discovery, as Plaintiffs have provided responses to

¹ Plaintiffs, again represented by the same counsel, also filed a case captioned *Neighbors v. King County*, No. 2:15-cv-00970-MJP (“*Neighbors I*”) on June 16, 2015. In that case, Plaintiffs challenged “the maximum width of the trail King County could have acquired through operation of the Trails Act.” *Neighbors I*, 2015 WL 3949245, at *1 (W.D. Wash. June 26, 2015). Judge Pechman dismissed the case, without prejudice, “[b]ecause the inverse condemnation action [wa]s not ripe . . . and the federal court lacks jurisdiction over a declaratory judgment action based solely on disputes over state law.” *Id.* at *2.

interrogatories from King County. Harris Decl., Exs. C-H. The Parties have yet to file a discovery plan for *Neighbors II*. Likewise, the Parties have exchanged initial disclosures in *Hornish*, but not in *Neighbors II*. Harris Decl., Exs. I-J.

III. ARGUMENT

Rule 42 permits consolidation of cases “involving a common question of law or fact [which] are pending before the court.” Fed. R. Civ. P. 42(a). District courts have “broad discretion in deciding whether or not to grant a motion for consolidation, although typically, consolidation is favored.” *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 993-94 (C.D. Cal. 1984) (consolidating suits by multiple plaintiffs challenging constitutionality of INS’s voluntary departure procedure with respect to unaccompanied minor aliens because suits sought identical relief); *see also Dollens v. Zions*, 2001 WL 1543524, at *2 (N.D. Ill. Dec. 4, 2001) (“[C]onsiderations of judicial economy strongly favor simultaneous resolution of all claims growing out of one event.”).

Consolidation should be granted where the “saving of time and effort consolidation would produce” outweighs “any inconvenience, delay, confusion, or prejudice.” *See Roberts v. Heim*, 1989 WL 80403, at *1 (N.D. Cal. Mar. 22, 1989) (granting consolidation because cases arose out of the same conspiracy), *aff’d*, 42 F.3d 1401 (9th Cir. 1994); *see also* WRIGHT & MILLER, 9A Fed. Prac. & Proc. Civ. § 2383 (3d ed.) (Courts should “weigh the saving of time and effort that consolidation would provide against any inconvenience, delay, or expense that it would cause.”).

Here, it is beyond dispute that the *Hornish* Litigation and the *Neighbors II* Litigation involve common questions of law and fact.

Both Plaintiffs’ claims in *Neighbors II* and King County’s Counterclaims in *Hornish* seek to resolve disputes regarding Plaintiffs’ encroachments in the corridor. *Compare Hornish*, Answer, Counterclaim ¶ 3 (Dkt. No. 32) (Aug. 28, 2015) (regarding Plaintiffs’ “improvements that impede King County’s access to its property”), *with Neighbors II*, Compl. ¶ 24 (Dkt. No. 1) (Aug. 20, 2015) (regarding Plaintiffs’ “construction of walkways, driveways, parking areas, landscaping systems,

1 utilities and the planting of trees, shrubs and ground cover, all within the [ELSRC].”). Likewise, in
 2 both cases, Plaintiffs seek a declaratory judgment that King County holds no interest in the ELSRC
 3 other than an easement for recreational trail purposes. *Compare Hornish*, Am. Compl. ¶ 12 (Dkt. No.
 4 31) (Aug. 14, 2015) (“Plaintiffs seek a declaratory judgment ordering that the railroad only held an
 5 easement for railroad purposes and King County only acquired an easement for recreational trail
 6 purposes by and through the Trails Act with preservation of the right-of-way only for future railroad
 7 purposes and uses through railbanking.”), *with Neighbors II*, Compl. ¶ 22 (Dkt. No. 1) (Aug. 20,
 8 2015) (“Defendant acquired, at most, unrecorded and unperfected prescriptive easement rights to
 9 cross the area of the [ELSRC] that had been improved with railroad tracks, ties and ballast.”).

10 In fact, the claims and Parties are so aligned that the only Plaintiff from *Hornish* who is not
 11 also a party to *Neighbors II*, Thomas Hornish, actually serves as local counsel to the latter case.² And
 12 significantly, the Parties previously agreed that *Hornish* and *Neighbors II* are so similar that they
 13 require disclosure under Local Rules 26(f)(1) and 3(g), which apply to any case that “involves all or
 14 a material part of the same subject matter and all or substantially the same parties as another action.”
 15 *See Hornish*, Joint Status Report, ¶ 5(C) (Dkt. No. 38) (Sept. 30, 2015) (identifying *Hornish* and
 16 *Neighbors II* as related cases).

17 Consolidating the cases under these circumstances will clearly promote judicial efficiency.
 18 *First Mercury Ins. Co. v. SQI, Inc.*, 2014 WL 496685, at *3 (W.D. Wash. Feb. 6, 2014). “Upon
 19 consolidation, the court will be able to address any overlapping issues contained in the two cases in
 20 a more streamlined fashion.” *Id.* Moreover, King County is not aware of any reason why
 21 consolidating the actions will cause undue delay or prejudice to the *Neighbors II* Plaintiffs. To the
 22 contrary, given that Judge Pechman has already addressed one of the threshold issues that may arise
 23 in *Neighbors II* if the cases are not consolidated, consolidating the cases will actually allow *Neighbors*

24 _____
 25 ² Mr. Hornish appeared in *Hornish* as co-trustee of the Thomas E. Hornish and Suzanne J. Hornish Joint
 Living Trust, rather in his personal capacity.

1 *II* to proceed more expeditiously. In *Hornish*, the Court ruled that Plaintiffs must demonstrate “a
2 clear generation-to-generation chain of title” in order to assert title to the ELSRC through the
3 centerline presumption. 2015 WL 3561533, at *3. Consolidating these cases would allow the Court
4 to avoid ruling on duplicative briefing in *Neighbors II*.

5 **IV. CONCLUSION**

6 For the reasons set forth above, King County respectfully requests that the Court consolidate
7 the *Neighbors II* litigation with the pending *Hornish* litigation.

8
9 DATED this 12th day of October, 2015.

10 DANIEL T. SATTERBERG
11 King County Prosecuting Attorney

12 By: s/ David J. Hackett
13 DAVID HACKETT, WSBA #21236
14 Senior Deputy Prosecuting Attorney

15 By: s/ H. Kevin Wright
16 H. KEVIN WRIGHT, WSBA #19121
17 Senior Deputy Prosecuting Attorney

18 By: s/ Peter G. Ramels
19 PETER G. RAMELS, WSBA #21120
20 Senior Deputy Prosecuting Attorney

21 By: s/ Barbara Flemming
22 BARBARA A. FLEMMING, WSBA #20485
23 Senior Deputy Prosecuting Attorney

24 King County Prosecuting Attorney’s Office
25 500 Fourth Ave., 9th Floor
Seattle, WA 98104
Telephone: (206) 296-8820 / Fax: (206) 296-8819
Email: david.hackett@kingcounty.gov
kevin.wright@kingcounty.gov
pete.ramels@kingcounty.gov
barbara.flemming@kingcounty.gov

1 By: s/ Emily J. Harris
2 EMILY J. HARRIS, WSBA #35763
3 DAVID I. FREEBURG, WSBA #48935
4 Special Deputy Prosecuting Attorneys
5 Corr Cronin Michelson
6 Baumgardner Fogg & Moore LLP
7 1001 Fourth Avenue, Suite 3900
8 Seattle, WA 98154
9 Telephone: (206) 625-8600 / Fax: (206) 625-0900
10 Email: eharris@corrchronin.com
11 dfreeburg@corrchronin.com
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Attorneys for Defendant King County

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 12th day of October, 2015.

s/ Leslie Nims
Leslie Nims